IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL NO.466 OF 1996
in
SPECIAL CIVIL APPLICATION No.11047 of 1994
with
CIVIL APPLICATION No.4448 of 1996

Date of Decision: 6/04/2004

YAMINI J. DAVE

VERSUS

THE DIRECTOR, I.U.C.A.A. & ANOTHER

(for full cause title, see next sheet)

Coram:

The Hon'ble Mr.Justice Bhawani Singh, Chief Justice

The Hon'ble Mr.Justice H.K.Rathod, Judge

Whether approved for reporting?

For the Appellant Mrs.Sangeeta Pahwa, Adv.
For the Respondents Mr.M.R.Bhatt, Adv.

PER: H. K. RATHOD, JUDGE (C.A.V. Judgment):-

#. In this Letters Patent Appeal, the appellant has challenged the judgment passed by Single Judge (Coram: M.S.Shah, J.) in Special Civil Application No.11047 of 1994 dated January 10, 1996, whereby, the petition filed by the appellant has been dismissed.

#. The facts giving rise to the present Letters Patent Appeal may be narrated thus. The appellant was appointed clerk-cum-typist by the respondents vide appointment

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Whether reporters of Local Papers may be allowed

to see the Judgment?

letter dated September 9, 1991, pursuant to advertisement dated May 11, 1991, in INFLIBNET programme with IUCAA, an autonomous registered society established by the University Grants Commission with head quarter at Ahmedabad. The candidates appointed to the posts advertised were to remain on probation for a period of one year from the date of appointment and subject to service conditions and conduct rules approved by the governing body of the INFLIBNET/ IUCAA. The appellant joined the post of clerk-cum-typist on September 11, 1991 with pay scale of Rs.950-1500. By Office Order dated September 15, 1992, the appellant was informed that her probationary period stood closed from 10.9.1992 (AM). The appellant proceeded on 90 days' maternity leave from May 3, 1994 to July 31, 1994, sought through application dated May 2, 1994. She reminded respondents vide letter dated May 28, 1994, to sanction her the leave. The respondents sanctioned the leave vide order dated June 2, 1994. During the intervening period, the appellant submitted medical bills to the tune of Rs.8,000/= which were sanctioned after reminders to that effect. Again, the appellant sought extension of maternity leave from August 1, 1994 to September 4, 1994 as per Rules applicable to Central Government employees. By Memorandum dated September 9, 1994, her services have been terminated. The appellant challenged her termination through Special Civil Application No.11047 of 1994. However, same has been dismissed by the impugned judgment. During the pendency of Appeal, amendment is sought and some documents are placed on file.

#. The appellant alleges that the respondents could not terminate her services, she having become permanent. Case of respondents is that the appellant was in project employment. Her tenure was extended from time to time like other employees. Ultimately, extension was not granted, therefore, by impugned order, she ceased to be in service. The Single Judge agreed with these submissions and held that the appellant was a project employee, her stay in service extended from time to time, therefore, she was not entitled to continuance in service nor entitled to confirmation/ regularization.

#. Through this Appeal, order of Single Judge has been challenged. While deciding the Special Civil Application, the Single Judge did not decide the question as to maintainability of the petition on the ground that he dismissed the petition on merits. Therefore, we permitted the respondents to advance submissions on this question during the course of hearing and substantiate

the preliminary objection raised by them in their reply-affidavit to the Special Civil Application. Therefore, before adverting to deciding the Appeal on merits, it is desirable to deal with the preliminary objection. The respondents simply state in the reply that petition is not maintainable since the respondents are not State/ other authority within the meaning of Article 12 of the Constitution of India. Except making this statement, no material has been placed in justification thereof. Further, no decision has been cited in support of the claim. However, from perusal of the material available on record, it is crystal clear that IUCAA is an autonomous body and INFLIBNET is also an autonomous body by this time according to the counsel for respondents. This project is funded by University Grants Commission. Hundred percent funds are released by Union of India and University Grants Commission. It is therefore an autonomous body with financial and pervasive control of the State, majority of the Directors of the Board being State nominees, State electees and it performs public nature of functions. The question whether a body is State/ authority within the meaning of Article 12 of the Constitution of India has been examined by Apex Court and High Courts in a large number of decisions by this time. However, suffice it is to make mention of Pradeepkumar Biswas v. Indian Institute of Chemical Biology and others (2002(5) SCC 111). In paragraph 17, it is observed that:

"17. For identifying such an agency or instrumentality it propounded four indicia :

[1] "A finding of the State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action." [SCC p.454, para 96]

[2] "Another factor which might be considered is whether the operation is an important public function." [SCC p.454, para 97]

[3] "The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State

action. If the function does not fall within such a description, then mere addition. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion." [SCC p.454, para-97]

[4] "The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the Government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business ?" [SCC p.458, para 111]

Having examined the matter carefully, we have no difficulty in holding that the respondents are State/ authority within the meaning of Article 12 of the Constitution of India, contention to the contrary is therefore rejected.

#. Having decided the preliminary objection, we turn to deal with the case on merits. It is undisputed between the parties that initially the appellant was offered appointment by order dated 9th September, 1991 containing terms and conditions prescribed therein, issued by the Administrative Officer, INFLIBNET programme. The appellant was appointed in INFLIBNET programme of Inter University Center for astronomy and astro physics, an autonomous institution of the University Grants Commission. The pay scale of the appellant was at par with the Central Government employees and also having similar status. Initially, the appointment was made for a period of two years from the date of joining on the post, which was likely to continue indefinitely, subject to passing of the typing test. Thus, the initial appointment was on probation for a period of one year from the date of appointment which may be extended or curtailed at the discretion of the competent authority. It is also on record that the post on which the appellant came to be appointed was transferable anywhere in India or even abroad at any sub center or stations of INFLIBNET programme / IUCAA. The scheme of IUCAA for the provident fund is applicable to the appellant. The said appointment was subject to bye-laws and service conditions of IUCAA including the amendments thereto issued from time to time applicable to the administrative / supporting staff until the INFLIBNET becomes autonomous. After INFLIBNET becomes an autonomous, appointment was to be governed by the bye-laws and service conditions of INFLIBNET. The appellant accepted the offer of appointment on the aforesaid terms and

conditions and Appellant submitted joining report in the service of the respondent on 11th September, 1991. In the advertisement, it was provided that initially, the candidate appointed will be on probation for one year from the date of appointment. The order of appointment is dated 18th September, 1991 and terms and conditions are governed as per the offer of appointment dated 9th September, 1991. The appellant passed the skill test conducted by the respondent on 27th August, 1992. The leave of the appellant for a period from 5th September, 1994 to 30th September, 1994 was refused by the respondents. The appellant completed two years' service on 10th September, 1993. Prior to that, by order dated 15th September, 1992, the appellant was informed by the respondents that her probationary period stands closed with effect from 10th September, 1992. She continued in service upto 10th September, 1993 and completed total period of two years as per the appointment letter dated 9th September, 1991. In the office note dated 17.8.93, cases of G.S.Negi, Mrs.Sahana M. Munshi, Yamini J.Dave (appellant) and A.P.Asthani were discussed by the respondents with regard to extension of project appointment. Therein, question was raised that there was no mention in the advertisement that appointment will be on year to year basis and even UGC had not instructed for the same at the time while sanctioning some initial posts. Secondly, there are orders regarding permanent absorption of an employee with above type of appointment, which are contrary to the spirit of the permanent absorption. Ultimately, the following decision has been taken which is reflected from page.90 of the petition :

> "Persons who have joined on immediate absorption basis, the condition of initial two years appointment will not be applicable to them and they should be made permanent. These employees are like other permanent employees of IUCCA and posted for IUCAA's INFLIBNET project at Ahmedabad. In the event of any problem with INFLIBNET project these employees should be prepared to come to IUCAA at Pune for service. In other cases the appointment may be extended on year to year basis."

#. This decision is approved by the Director on 17th August, 1993 and as a result thereof, the appointment of the appellant, was converted into year to year basis. Accordingly, by office order dated 10th September, 1993, the appointment of appellant, in continuation of the earlier order dated 18th September, 1991, has been treated as project appointment, expiring on 10th

September, 1993, and the same has been extended for a further period of one year from 11th September, 1993 to 10th September, 1994. The other terms and conditions governing her appointment were to remain the same. It is relevant to note that the Committee of four persons convened for examining two cases including the appellant for extension, has observed qua appellant that [a] she has attended the office only for 29 days during 1994, [b] she has been casual and careless and in spite of oral reprimand there has not been any improvement during the period of present extension. This aspect is also reflected in her C.R. for the year 1994. The observations of the committee are dated 19th August, 1994. However, before that, by order dated 6th August, 1994, it has been informed to the Evaluation Committee for the performance of appellant whose period has expired on 10th September, 1994. Thereafter, by Memorandum dated 9th September, 1994, in continuation of the earlier office order dated 10th September, 1993, it was decided by the competent authority not to give any further extension beyond the 10th September, 1994 and therefore, the appellant was informed that she will cease to be in the service of IUCAA / INFLIBNET programme with effect from 10th September, 1994. This fact can be gathered from the record of the respective parties.

Bye-law of IUCAA, Rule 5[iii] which applies to the administrative and supporting staff, includes persons employed by the IUCAA for running and maintaining its infrastructure but does not include the persons hired on contractual basis for whom separate bye-laws-8 operates. Rule 2 relates to appointment and duration of service of the employees of the IUCAA. The relevant sub clause 2.1 is reproduced as under :

"2.1 Period of Service : Members of staff of IUCAA, excepting those appointed on a temporary basis and those appointed explicitly on a contractual basis, shall be appointed with a one year probation period. At the end of this period, probation may be extended but for not more than one year. At the end of the probation period, on the basis of an evaluation of the individual's performance during probation, the appropriate appointing authority may offer the staff member continuing appointment in IUCCA till the age of superannuation, namely 60 years in the case of Category [I] and 58 years in the case of Category [II] or [III]. If a staff member having a continuing appointment at IUCAA is made Director, then at the end of service as Director,

> then at the end of service as Director, he shall have the option to revert to the prior appointment, unless he has reached the age of superannuation. If any staff member during his service period happens to become the Director and reverts to his original post he shall not have any claim of age of superannuation upto 65 years. Age of superannuation of such an employee will be in accordance with the rules as are applicable to other normal employees."

This Rule-2.1 applies to staff members of IUCAA as defined in bye-law No.5 as referred to above. The period of probation is fixed for two years, and after one year, it can be extended for a further period of one year. If probationary period is closed or satisfactorily completed then, according to this Rule, the appointing authority may offer his staff member, continued appointment in IUCAA till age of superannuation viz. upto 60 years in case of category [I] and 58 years in case of category II and III.

#. In the light of material referred to above, it is clear that according to the advertisement, appointment of appellant was on probation for one year and appointment was made initially for a period of two years with clarification that post was likely to continue indefinitely. Service Rules of IUCAA are applicable to the appellant. One year probationary period stood closed with effect from 10th September, 1992 and therefore, issuance/ extension of the appointment on year to year basis, which is admittedly not provided in the advertisement, appears to be contrary to the letter of appointment dated 9th September, 1991. Therefore, the decision taken on 17th August, 1993 in Office Note extending the appointment of appellant on year to year basis is contrary to the principles of natural justice because initial appointment was for a period of two years. So after two years, the respondents were not authorised to convert her appointment on contractual basis. In advertisement, no such condition was incorporated, or made known to the appellant. Even UGC had not instructed so while sanctioning the post, but even then, decision has been taken to continue the appellant on year to year basis. That decision is illegal and arbitrary and it is hit by Article 14 of the Constitution of India. It is nowhere discussed that what would be a legal effect of closing of period of probation. Closing the period of probation without any adverse remarks and allowing the appellant to continue in

service thereafter, in the opinion of the Court, means that the appellant is a confirmed employee of the respondents. The observations of the Committee dated 19th August, 1994 which is at page.59 clearly made allegation against the appellant and misconduct has been alleged being casual and careless and no improvement and confidential report of 1994 is also credited as "Not Good". Relying on these observations, the committee has recommended that it will not be in the interest of INFLIBNET to give extension to Ms.Y.J.Dave. This recommendation has been accepted and accordingly services of the appellant have been terminated on 9th September, 1994. Therefore, considering the total facts, termination is not a simpliciter but it is attached with stigma. The foundation is recommendation of the Committee dated 19th August, 1994, wherein misconduct has been alleged against the appellant. However, without giving any opportunity and without holding any departmental inquiry, termination order has been passed by the respondents. The appellant was not initially appointed on project but she was appointed on regular or immediate absorption basis. Subsequently, without giving any opportunity to the appellant, to appoint her on contract basis, by taking arbitrary decision, is bad and is contrary to the terms and conditions of the appointment letter dated 9th September, 1991 and also against the principles of natural justice. This was not termination during probation period but it was after completion of probationary period. The positive decision has been taken by the respondent for closing probationary period on 15th September, 1992 with effect from 10th September, 1992. In the pay slip which is produced at page.118 after grant of increments in favour of the appellant, in column No.2, which is titled "whether it is substantive appointment or officiating", the contents of the column shows that it is "substantive" which suggests that the appellant was appointed on substantive basis and not on contractual basis.

#. We have gone through the judgment impugned in the this appeal. The conclusions of the learned Single Judge are that the appellant was not employed on the administrative set up of the IUCAA but was appointed on contractual basis for INFLIBNET programme and relevant bye-law-8 would apply and not Bye-law-5[III] and the appellant never acquiring any permanency right. No order of appointing the appellant as permanent employee was issued by the respondents and no such Rule has been pointed out and therefore, the appellant was considered as the temporary employee appointed for a specific period. This goes against the terms and conditions

incorporated in the letter of appointment dated 9th September, 1991. In letter of appointment, appellant was appointed for a period of two years which was likely to continue for indefinite period. That aspect has been ignored by the learned Single Judge. The relevant question, namely after a period of one year the probation period stood closed, meaning thereby, positive action/decision was taken by the respondents of closing period of probation, whether the appellant became a permanent employee of the respondents as the post on which the appellant was appointed was a permanent post sanctioned by the U.G.C., seems to have not been examined by the learned Single Judge. Bye-law No.2.1 makes it very clear that after completion of the probationary period of one year, if period is not extended, then the respondents must have to offer such staff member, continuing appointment in IUCAA till age of superannuation. Therefore, distinction which has been made by the learned Single Judge that the appellant was not appointed by IUCAA is totally irrelevant in light of the facts that IUCAA bye-laws are fully applicable to the appellant. Therefore, the appellant is entitled to claim legal right based upon the bye-laws of the IUCAA. Therefore, the finding of the learned Single Judge that the appellant was a temporary employee appointed for a specific period, seems to be contrary to the letter of appointment and contrary to the record and bye-laws. The learned Single Judge has also while answering the contentions Nos.II & III, come to the conclusion that the respondent is justified not to extend the period of appellant on the basis of Committee report where misconduct has been alleged and therefore, the respondent is justified in their action. It also reflects that the aspect of absenteeism and the administration having suffered because of that also weighed with the learned Single Judge. Further finding is that a person who is not given the benefit of extension of employment on the ground of intermittent absence and for his/ her unsuitability or inefficiency, cannot claim protection under Articles 14 an 16 of the Constitution merely because other employees are continued in service. This finding is also contrary to the record. It seems that the learned Single Judge has ignored the fact that further period of extension was not granted because of some allegation made against the appellant about absence and her unsuitability and inefficiency. Even temporary employees are also entitled to minimum requirement, i.e. an opportunity of hearing before passing any adverse order. The learned Single Judge has also not appreciated that such action or decision not to extend the period of service, is contrary to the principles of natural justice

which was based upon the committee's report where allegations are made against the appellant. The learned Single Judge has also come to the conclusion that temporary Government servant has no right to post and the competent authority can terminate his services by an innocuous order of termination without causing any stigma on him and such orders can be passed even without holding departmental inquiry. The learned Single Judge has considered the decision of the Apex Court in case of STATE OF UTTAR PRADESH AND ANOTHER V. KAUSHAL KISHORE SHUKLA [(1991) 1 SCC 691] and other decisions referred in the impugned judgement. According to the learned Single Judge, appellant having no legal right to be heard before not extending the period of service, the appellant is not suitable to the post and where service of the appellant has not been extended, there is nothing wrong in it when she has remained absent. Notice as per bye-law 2.5.1 to terminate service of the appellant is also not necessary because her services came to an end by afflux of time. In respect of the contention of malafide raised by the appellant, in absence of the details, same is also rejected by the learned Single Judge. The last contention about considering the case of the appellant on humanitarian ground is also rejected by the learned Single Judge.

After our thoughtful consideration, we find that the learned Single Judge has erred in rejecting the petition and coming to such conclusion which is found contrary to the record, bye-laws and principles of natural justice. It seems that the matter was not properly taken into consideration by the learned Single Judge, more particularly, in light of the background that what would be the legal effect of the positive decision taken by the respondent to close probationary period after completion of the one year service. In that order, dissatisfactory work or unsuitability is not mentioned. Even inefficiency is also not mentioned and the appellant continued in service for further period of one year. The moment probationary period is not extended further or no order of termination is passed against an employee or where probationary period is closed after completion of one year, it means that there is positive decision taken by the authority to the effect that probationary period has been cleared with satisfactory work by the employee. Even it is also not the case of the respondent that during probation period of one year, the appellant remained inefficient and was not found suitable and was inefficient. Whatever observations that were made by the committee related to subsequent period of probation, that is to say, when the appellant became a permanent employee

of the respondent.

#. The learned advocates for the respective parties have cited before us decisions of the Hon'ble Apex Court in support of their rival contentions. We have gone through the decisions relied upon by the learned advocates and in our opinion, there is no dispute with the ratio laid down in the decisions of the Apex Court cited before us and we are in full agreement with the same. But same are not applicable to the facts of the present case.

##. Learned advocate Mr.M.R.Bhatt, relying on the decisions referred above in written submissions, contended that non extension of project appointment does not tantamount to stigma. He relied upon certain decisions. It is his submission that appointment to appellant has been given by the INFLIBNET and not by the IUCAA or UGC. It is also contended that the principle of legitimate expectation is not applicable in the case of the temporary appointment and that since INFLIBNET is not an "industry", provisions of Section 25-F of the Industrial Disputes Act are also not applicable to the case of the appellant. The appointment of the appellant was for fixed period and after completion of probationary period, there is no deemed regular appointment or deemed confirmation even if an employee remained continued in service after completion of the probationary period and mere continuation does not amount to confirmation. He also emphasised that there was no need to issue show cause notice since there was no termination order because service of the appellant come to an end by afflux of time. The appellant had accepted one year contractual appointment and not objected and therefore, non extension of project employment was not stigmatic and her period of service was not curtailed and therefore services of the appellant were rightly terminated.

11. We have considered decisions relied upon by the learned advocates for both the parties. Looking to the facts of the present case, the appellant was appointed in pursuance of the advertisement wherein probation period is stipulated for one year. Similarly, in the offer of appointment also, period of probation is fixed for one year. Appointment, as per offer of appointment is for a period of two years which is likely to continue indefinitely. In letter of appointment, there is no contractual appointment or conditions incorporated by the respondents. One year probationary period has been closed and thereafter also the appellant remained in service working in substantive post as mentioned in the

order of granting increment in favour of the appellant as transpired from the record produced by the respondents. After completion of two years, the appellant's service conditions have been altered and changed adverse to her right by appointing her on contractual basis for a period of one year. That decision itself is arbitrary because at that occasion, it was the duty of the respondent to give an opportunity to the appellant to show cause as to why the conditions of service of the appellant as incorporated in the letter of appointment should not be altered or changed to her disadvantage. No doubt, that appointment on contractual basis for a period of one year was accepted by the appellant but that may not be sufficient because looking to the unemployment ratio in the country, naturally, anyone may surrender to the terms of the employer. But merely acceptance of the order does not amount to acceptance on free will. The respondent being the employer was a State Authority and it ought to have acted in accordance with law and in all fairness as is naturally expected from the State Authority, which is not found from the action of the respondent authorities. The Apex Court in the decision rendered in the case of CENTRAL INLAND WATER reported in AIR 1986 SC 458 held that such contract or contractual appointment is itself opposing the public policy and contrary to Section 23 of the Contract Act and violative of Article 14 of the Constitution of India. Therefore, mere acceptance of an appointment on contract basis cannot alter status of an employee after completion of the probationary period as per the provisions made in the Bye-laws by IUCAA.

##. We have considered submissions made by the learned advocates for the parties including the written submissions and relevant decisions relied upon in support of their respective contentions. The issue of probation has been examined by the Apex Court in number of cases. There are number of decisions on the point that after completion of probationary period, whether employee is deemed to be confirmed or not. Almost all the decisions are based on relevant service rules and facts of each case. The second issue involved in this appeal is that if service of a probationer is terminated on the ground of inefficiency, unsatisfactory work and alleging other misconduct, the prior to doing so, whether a reasonable opportunity is necessary or not. Even on this issue, there are number of decisions of the Apex Court. In some cases, it has been considered to be stigma and held that an opportunity is necessary, whereas in some cases, considering the assessment by employer during probationary period, it is held that such termination does not cast stigma and no opportunity is necessary.

Ultimately the decisions of the Apex Court are based on facts of each case. Therefore, we are not examining the matter from academic point of view but we are applying the law in light of the facts of the present appeal. The facts are very clear which are on record. Service Rules are clear, on the basis of which, letter of appointment has been issued in favour of the appellant. The letter of appointment dated 9th September, 1991 amply makes clear that though the appointment is made initially for a period of two years but probation period has been fixed for a period of one year which may be extended or curtailed at the discretion of the competent authority. Service Rules of IUCAA have been adopted by the INFLIBNET. As per the advertisement, same are made applicable and even as per the letter of appointment probation period is for a period of one year which may be extended but not for more than one year, meaning thereby, the maximum period of probation is for two years. After completion of probation period, considering individual's performance, the appointing authority may offer to the staff member continuing appointment till age of superannuation. The legal effect of this is that service of an employee concerned stands confirmed if the probation period is over and not extended. As per the letter of appointment, the appellant has been considered in the category of administrative / supporting staff as per condition [11]. Therefore, Service Rule of IUCAA-8 which is applicable to the contractual services, would not be applicable to the appellant, but Service Rule 5[III] is applicable to the appellant. The probation period has been closed by order dated 15th September, 1992 with effect from 10th September, 1992. In other words, the probation period was not extended by the respondent. If probation period is not extended, then according to the service rules, when there is nothing adverse found against the appellant and not communicated to the appellant while closing the probationary period, naturally, the appellant becomes a confirmed employee. Not only this, the appellant continued in service for a further period of one year as a confirmed employee. Even thereafter also, by order dated 10th September, 1993 the service of the appellant came to be extended as project appointment for a period of one year from 11th September, 1993 to 10th September, 1994. It is relevant to note that said decision has been taken by the respondent on 17th August, 1993 knowingly fully well that such appointment of appellant is contrary to the advertisement and conditions incorporated in the letter of appointment. The said decision is contrary to the principles of natural justice as well as settled law. When probation period is closed and thereafter the appellant remains in

service for further period of one year without any extension as per the condition incorporated in the letter of appointment, then he becomes a confirmed employee by positive act of the respondent. To alter the condition of service of the appellant thereafter without giving any opportunity and to convert her services as project appointment and on contractual basis has caused serious prejudice to the appellant against her legal right being a confirmed employee under the Service Rules.

##. At this stage, what reveals from the record is that the intention of the respondent was not bonafide because though the appellant was appointed on regular basis, means, immediate absorption basis, her services were considered or treated as contractual and project appointment. The decision taken by the respondent in office note dated August 17, 1993 at page.90 which is very relevant, clearly suggests that the intention of the respondent was not bonafide but it was colourable exercise of powers. The impugned decision is quoted as under :

> "As desired by the Director, I discussed the matter telephonically today, i.e. 17.8.1993 at 11.30 a.m. regarding extension of appointment of the above Officials with Senior Administrative Officer, IUCAA, Pune. The SAO was clarified some points regarding initial approval of UGC for the posts, advertisement, permanent, absorption, etc. Firstly there was no mention in the advertisement that the appointment will be on year to year basis and even the UGC had not instructed for the same at that time while sanctioning some initial posts. Secondly when there are orders regarding permanent absorption of an employee above type of absorption order, these aspects were discussed with SAO, he concluded his advice as follows :"

##. A bare reading of the above referred paragraph of the decision dated 17th August, 1993 of the respondent suggests that when there was no mention in advertisement that appointment will be on year to year basis and even when UGC had not instructed for the same at the time while sanctioning some initial posts, contrary to the spirit of the conditions incorporated in the appointment letter, decision has been taken to appoint the appellant as project appointment on year to year basis. This decision created a situation against the appellant and it became a defence of the respondents that her service was contractual and project appointment on year to year basis

which was not extended further and therefore, it comes to an end by afflux of time. According to our opinion, this decision dated 17th August, 1993 itself is arbitrary, contrary to the principle of natural justice and advertisement as well as conditions mentioned in the letter of appointment. Therefore, extension of one year service vide order dated 10th September, 1993 itself is bad, more so when the appellant continued in service as confirmed employee. Her status has been changed without giving any opportunity and therefore also, it is bad.

##. The Hon'ble Supreme Court had an occasion to examine the issue that after completion of probation period, whether it amounts to an automatic confirmation or it requires positive decision from employer, in WASIM BEG V. STATE OF U.P. AND OTHERS [(1998) 3 SCC 321]. The Apex Court has observed that such situation would depend upon the provisions in the relevant service rules relating to probation and confirmation. Where the Rules provide for a maximum period of probation beyond which probation cannot be extended, then at the end of the maximum probation period there will be a deemed confirmation of the employee unless the rules provide to the contrary. However, even when the rules prescribe a maximum period of probation, if there is a further provision in the rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. There may be cases where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer [either by issuing an order of confirmation or any similar act] which would result in confirmation of the employee. In these cases unless there is an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. Considering the above decision of the Apex Court and looking to the facts of the present appeal, the Service Rules provide for maximum period of probation for a period of two years, initially for one year, which can be extended for a further period of one year. The probation period has been closed after completion of one year service of the appellant by the respondent. Non extension of further period of one year, means, the appellant is deemed to be confirmed employee because the Rules do not provide to the contrary. There is no provision in service rules of IUCAA which provides otherwise. The relevant observations in WASIM BEG

(supra) made by the Apex Court relying upon the earlier decision in identical case in para-15 are quoted as under :

"15. Where an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with State of Punjab v. Dharma Singh, M.K.Agarawal v. Gurgaon Gramin Bank, Om Prakash Maurya v. U.P. Coop Sugar Factories Federation, State of Gujarat v. Akhilesh C. Bhargav. "

##. In the case of STATE OF PUNJAB V. DHARAM SINGH reported in AIR 1968 SC 1210, the Full Bench of the Apex Court has considered the question of "deemed to be confirmed" in identical case. The relevant observations of the Apex Court in aforesaid case in para-8 and 9 are quoted as under :

"[8] The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. But under the proviso to R.6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to R.6(3), it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.

[9] Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or

> conduct during-the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfil any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960, and the High Court rightly refused to draw the inference that they were so discharged from service and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed. in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the, authority had no power to dispense with their services under R.6(3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The' removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Art. 311 of the Constitution. As the' procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Art. 311 was violated, the impugned orders' were rightly set aside by the High Court."

##. The case of the appellant is squarely covered by the aforesaid observations of the Apex Court. The Service Rules of IUCAA No.2[1] provides for appointment and duration of service of the employee and a maximum period of probation for two years and no extension has been provided further. At the end of the probation period, appointing authority has to offer continuing appointment. In the facts of this case, after closing probation period, the appellant remained in service and

as per the service rules, when period of probation is not extended, it is to be assumed that the appellant became a confirmed employee by positive act or similar act of closing of probation period. Therefore, project appointment and contractual appointment given to the appellant by order dated 10th September, 1993 itself, in our opinion, is bad and such appointment is contrary to the public policies as the employee was not in bargaining situation because of unemployment and such order which is opposed public policy, is obviously hit by Article 14 of the Constitution of India. It is also necessary to note very important aspect that the moment the probation period has been closed after completion of one year service, due increments have been released in favour of the appellant with effect from 1st September, 1992. The periodical increment certificate produced by the appellant at page.118 - Annexure-I, wherein it is mentioned below the column, "whether the concerned employee working in substantive post or Officiating post", that the appellant is working on "Substantive" post, that is to say, as a confirmed employee and not working even on contractual basis. Thus, from 1st September, 1992, to further period of one year, the appellant was working with respondent in substantive post [confirmed] category. This may be termed as positive action of the respondent to appoint the appellant in substantive post in question, in other words, it is similar act which has been emphasised by the Apex Court in above referred decision and therefore, the appellant became confirmed employee.

##. It is also relevant to have inference of deemed confirmation of the appellant from the record of the respondent from letter dated 27th August, 1992 wherein, it is mentioned that the appellant has passed skill test in English Typing which was conducted on 27th August, 1992 and the appellant was informed that she has passed skill test, that in view of passing of the required skill test, she has successfully completed requirement of offer of appointment in that regard. This letter itself makes it clear that the appellant successfully fulfilled all the requirements of letter of appointment and one year probation period was also satisfactorily and successfully completed by her, as stated above. This letter is prior to completion of one year from the date of letter of appointment dated 9th September, 1991. This document also suggests that the appellant's probation period is closed after period of one year and she became a confirmed employee.

##. appellant had applied for maternity leave in the

year 1994 and also applied for medical bills. The leave has been rejected which has been considered as absent period in the year 1994. However, in fact, the appellant had never proceeded on unauthorised leave or remained absent unauthorisedly during her service period. The period the appellant had requested for maternity leave which was rejected subsequently by the respondent and that is how created a situation that in the year 1994 as if the appellant worked only for 29 days. This is factually incorrect and seems to have been taken into consideration by the Committee while taking the impugned decision to discontinue the appellant. In view of the observations made by the Apex Court in MUNICIPAL CORPORATION OF DELHI V. FEMALE WORKERS [MUSTER ROLL] AND ANOTHER reported in [2000] 3 SCC 224, the appellant is entitled to maternity leave under the provisions of the Maternity Benefit Act, 1961 as well as Service Rules of IUCAA. The relevant paragraph-33 is quoted as under :

"33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to ear their livelihood. Whatever be the nature of their duties, their avocation and the place where they work, they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomenon in the lift of the a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working workman would face in performing her duties at the workplace while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre- or post-natal period."

It is also necessary to note that services of the appellant have been discontinued during the period of maternity leave, and even this act of respondents is also illegal and arbitrary.

##. Now coming to another the aspect, services of the

appellant have been terminated on 9th September, 1994 on the ground that it is decided by the competent authority not to give any further extension beyond 10th September, 1994 and the appellant ceased to be in service of IUCAA / INFLIBNET programme with effect from 10th September, 1994. This decision not to extend the period of appellant is based on the decision of the Committee consisting of four persons dated 19th August, 1994. The committee, in case of the appellant, observed that she has attended the office only for 29 days during 1994 and she has been casual and careless and inspite of oral reprimand, there has not been any improvement during the period of present extension. This aspect is also reflected in her confidential report for the year 1994. On the basis of said decision, it was decided by the committee not to recommend an extension in service to the appellant and it was recommended that it will not be in the interest of the respondent to give extension to the appellant beyond present tenure. Based on the relevant observations of the recommendations of the committee, ultimately, the service of the appellant has been terminated on 10th September, 1994. Therefore, the question is whether observations made by the Committee as "casual, careless and no improvement during extension period and to remain absent", can be said to be stigma or not ? In fact, the appellant was deemed to be a confirmed employee as observed by us above, but termination is based on such recommendations which made allegations against the appellant about misconduct and even though, no opportunity was given to the appellant and straightaway her services have been terminated by the respondent. In such circumstances, it is the duty of the Court to lift the veil to find out the real cause for termination. If real cause is an allegation or misconduct, then an opportunity has to be given following the principles of natural justice. The difference between the foundation and motive for termination has been discussed by the Apex Court in case of DIPTI PRAKASH BANERJEE V. SATYENDRA NATHBOSE NATIONAL CENTER FOR BASIS SCIENCES, CALCUTTA AND OTHERS reported in 1999 SCC Lab & Service pg.596. The relevant observations of the Apex Court in aforesaid decision in para-34 to 37 are referred as under :

"34. It will be seen from the above case that the resolution of the Committee was part of the termination order being an enclosure to it. But the offensive part was not really contained in the order of termination nor in the resolution which was an enclosure to the order of termination but in the Manager's report which was

referred to in the enclosure. The said report of the Manager was placed before the Court along with the counter. The allegations in the Manager's report were the basis for the termination and the said report contained words amounting to a stigma. The termination order was, as stated above, set aside.

35. The above decision is, in our view, a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be asked for or called for by any further employer for the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular enquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma.

36. It was in this context argued for the respondent that the employer in the present case had given ample opportunity tot he employee by giving him warnings, asking him to improve and even extended his probation twice and this was not a case of unfairness and this Court should not interfere. It is true that where the employee had been given suitable warnings, requested to improve, or where he was given a long rope by way of extension of probation, this Court has said that the termination orders cannot be held to be punitive. [See in this connection Hindustan Paper Corpn. v. Purnendu Chakrobarty, Oil & Natural Gas Commission v. Dr.Md. S. Iskender Ali, Unit Trust of India v. T.Bijaya Kumar, Principal, Institute of Postgraduate Medical Education & Research, Pondicherry v. S. Ande and a labour case Oswal Pressure Die Casting Industry v. Presiding Officer]. But in all these cases, the order were simple orders of termination which did not contain any words amounting to stigma. In case we come to the conclusion that there is stigma in the impugned order, we cannot ignore the effect it will have on the probationer's further whatever be the earlier opportunities granted by the respondent Organisation to the appellant to improve.

37. On this point, therefore, we hold that the words amounting to "stigma" need not be contained in the order of termination but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination. Point 3 is decided accordingly."

##. This very aspect has also been examined by the Apex Court in case of NAR SINGH PAL V. UNION OF INDIA AND OTHERS [200 AIR SCW 1141] relying on the earlier decision in case of GUJARAT STEEL TUBES LTD V. GUJARAT STEEL TUBES MAZDOOR SABHA, [AIR 1980 SC 1896, para-53]. The relevant observations made in para-8, 9, and 10 are reproduced below :

"8. The documents which have been placed before us pertain to the preliminary enquiry made against the appellant in which the statement of certain persons who had seen the incident was recorded. The services of the appellant were, thereafter, terminated by paying him the retrenchment compensation through a cheque along with the order dated 20.5.1992. The order having been passed on the basis of preliminary enquiry and not on the basis of regular departmental enquiry without issuing a chargesheet or giving an opportunity of hearing to the appellant, cannot be sustained.

9. We may, at this stage, refer to the observations of Krishna Iyer, J. in Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazadoor Sabaha [1980 2 SCC 593 : [AIR 1980 SC 1896 : 1980 Lab IC 1004] in which the learned Judge observed as under :-

"53. Masters and servants cannot be permitted to pay hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavor in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a

termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non injurious terminology is used."

[Emphasis supplied]

10. Applying the above principles, the order in the instant case, cannot be treated to be a simple order of retrenchment. It was an order passed by way of punishment and, therefore, was an order of dismissal which having been passed without holding a regular departmental enquiry, be sustained."

##. Again this point has again been examined and considered by the Apex Court in case of V.P.AHUJA vs. STATE OF PUNJAB [2000 [2] SCW 792]. Relevant observations made in para-5 to 9 are referred as under :

"5. The observation of the High Court that -

"The impugned order is not stigmatic and nothing at all has been urged that may detract from such an order being passed during the currency of probation."

is surprising, to say the least. The order by which the services of the appellant were terminated has already been quoted by us above. The order, ex facie, is stigmatic as also punitive. The order is founded on the ground that the appellant had failed in the performance of his duties administratively and technically. It is for this reason that the services of the appellant were terminated. As pointed out above, the order ex facie, is stigmatic.

6. Learned counsel for the respondents has

contended that the appellant, after appointment was placed on probation and though the period of probation was two years, his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter. It is contended that the appellant cannot claim any right on the post on which he was appointed and being on probation, his work and conduct was all along under scrutiny and since his work was not satisfactory, his services were terminated in terms of the conditions set out in the Appointment Order. This plea cannot be accepted.

7. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice.

8. The affidavits filed by the parties before the High Court as also in this Court indicate the background in which the order, terminating the services of the appellant, came to be passed. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the appellant.

9. The entire case law with respect to a "probationer" was reviewed by this Court in a recent decision in Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta, [1999] 3 SCC 60 : AIR 1999 SC 983 : [1999] 1 JT [SC] 396 : [199 AIR SCW 605 : 1999 Lab IC 1114]. This decision fully covers the instant case as well, particularly as in this case, the order impugned is stigmative on the face of it."

##. In case of SAMSHER SINGH V. STATE OF PUNJAB AND ANOTHER, reported in AIR 1974 SC 2192, the full bench of the Apex Court has considered and held that substance of the order and not the form would be decisive. The observations in para-65 to 67 in the above case are relevant and therefore, reproduced hereunder:

"65. The fact of holding an inquiry is not always conclusive. The fact of holding an inquiry is not always conclusive. What is

decisive is whether the order is really by way of punishment. (See State of Orissa v. Ramnarain Das [1961] 1 S.C.R. 606). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance, (See Madan Gopal v. State of Punjab [1963] 3 S.C.R. 716). In R. C. Lacy v. State of Bihar & Ors. (Civil Appeal No. 590 of 1962 decided on 23 October, 1963) it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311 (2). (See R. C. Banerjee v. Union of India [1964] 2 S.C.R. 135.) A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 (See Champaklal G. Shah v. Union of India [1964] 5 S.C.R. 190). On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (See Jagdish Mitter v. Union of India A.I.R. 1964 S.C. 449).

66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive. (See K. H. Phadnis v. State of Maharashtra [1971] Supp. S.C.R. 118 = (AIR 1971 SC 998).

67. An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct. (See State of Bihar v. Shiva Bhikshuk [1971] 2 S.C.R. 191 = (AIR 1971 SC 1011)."

##. Similarly, in case of CHANDRA PRAKASH SHAHI v. STATE OF U.P. AND OTHERS, reported in 2000 AIR SCW 1816, the Apex Court has considered the issue involved in the present petition. The relevant observations of the Apex Court in above case in para-28, 29 and 30 are reproduced as under :

"28. The improvement principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which implies action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which implied the employer to take this action. If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the

allegations of misconduct which were found to be true in the preliminary enquiry.

30. Applying these principles to the facts of the present case, it will be noticed that the appellant, who was recruited as a Constable in the 34th Battalion, Pradeshik Armed Constabulary, U.P., had successfully completed his training and had also completed two years of probationary period without any blemish. Even after the completion of the period of probation under Para 541 of the U.P. Police Regulations, he continued in service in that capacity. The incident in question, namely, the quarrel was between two other Constables in which the appellant, to begin with, was not involved. When the quarrel was joined by few more Constables on either side, then an enquiry was held to find out the involvement of the constables in that quarrel in which filthy language was also used. It was through this enquiry that appellant's involvement was found established. The termination was founded on the report of the preliminary enquiry as the employer had not held the preliminary enquiry to find out whether the appellant was suitable for further retention in service or for confirmation as he had already completed the period of probation quite a few years ago but was held to find out his involvement. In this situation, particularly when it is admitted by the respondent that the performance of the appellant throughout was unblemished, the order was definitely punitive in character as it was founded on the allegations of misconduct."

##. Therefore, after considering the law laid down by the Apex Court in repsect of the second issue, namely, whether the order of termination is stigmatic or not and regular departmental inquiry is necessary or not and principle of natural justice requires to be observed or not, in our opinion, looking to the decision taken by the Committee on 19th August, 1994, allegations have been made as regards no improvement, casual approach and carelessness and remaining absent, as also made in the C.R. for the year 1994, are bad and unfortunately, same became basis to terminate the service of the appellant. Not only this, the committee also recommended not to extend the period because of observations made by the committee were accepted. Therefore, it is a clear case of termination based on allegation attached with stigma. Inspite of that, no opportunity was given to the

appellant who is deemed to be confirmed and as such, no regular departmental inquiry was held and therefore, in such circumstances, the order of termination is held to be illegal.

##. We have perused the order passed by the learned Single Judge. In our opinion, the matter has not been properly examined by the learned Single Judge and the real issue seems to have been lost sight of by the learned Single Judge. The learned Single Judge has not examined the issue that after period of probation was closed and the appellant was appointed on substantive post and in that capacity and after passing the skill test, the appellant satisfactorily completed all the terms and conditions incorporated in the letter of appointment, which means, in all respect that the appellant became confirmed employee and thereafter extension on year to year basis itself was bad and therefore, termination of confirmed employee on the basis of the allegation, without holding any departmental inquiry, in our opinion, is illegal, arbitrary and contrary to the principles of natural justice, hit by Article 14 of the Constitution of India and therefore, the judgment and order passed by the learned Single Judge impugned in this Appeal deserves to be interfered with and the same is quashed and set aside.

##. According to our opinion and finding above, the termination order is illegal and arbitrary and also violative of Article 14 of the Constitution of India. Therefore the appellant is entitled to be reinstated with continuity of service. Now therefore, the question arises for consideration about backwages of the interim period. In view of the above discussion and our considered findings, the appellant is entitled to full backwages of the interim period with all consequential service benefits. Unless the respondent produces any material to have exception, namely, where the employer produces any material of gainful employment of the appellant, then in that case, the Court has to consider such material, otherwise, once the order of termination is held to be illegal, then the normal result would be reinstatement with full backwages because though the appellant was ready and willing to work, because of the illegal order of termination, the respondent has not allowed the appellant to work and therefore the appellant remained without work for pretty long time. In such circumstances, Court should not deny the legitimate right which has accrued in favour of the appellant. This aspect has been examined by the Apex Court in case of M/S HINDUSTAN TIN WORKS PVT LTD. THE EMPLOYEES OF M/S

HINDUSTAN TIN WORKS PVT LTD AND OTHERS reported in AIR 1979 SC 75. The relevant observations made by the Apex Court in above case in para-9 read thus:

"9. It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigating activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz ., to resist the workman's demand for revision of wages. the termination may well amount to unfair labour

practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavored to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it the were forced to litigation upto the apex Court and now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workman were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workman were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Gram Panchayat v. Safai Kamldar Mandal(1), and a Division Bench of the Allahabad High Court in Postal Seals Industrial Co-operative Society Ltd. v. Labour Court 11, Lucknow & ors.(l), have taken this view and we are of the opinion that the view taken therein is correct."

Recently, this aspect is examined by the Apex Court in case of Union of India versus Madhusudan Prasad, reported in 2004 SCC L/S page 29. Relevant para 5 and 6 are quoted as under:

"5. It is true that when a reinstatement is ordered in appeal or review, the authorities can pass specific order regarding the pay and allowances to be paid to the government servant for the period of his absence from duty preceding the dismissal, removal or compulsory retirement, as the case may be. This is an enabling provision and the authorities can consider the relevant facts as to whether the employee should

be denied the salary for the period he was kept under suspension preceding the removal, dismissal or compulsory retirement. The counsel for the appellant has placed reliance on the decision of the Constitution Bench of this Court in Managing Director ECIL V. B.Kaarunakar where this Court held that the question whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement, if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceeding and depending on the final outcome. If the employee succeeds in the fresh enquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any, and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the enquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh enquiry from the stage of furnishing the report and no more, where such fresh enquiry is held.

6. The above case was concerning an employee, who was found guilty in an enquiry but the report was not furnished to the employee and the show cause notice was not served on him. In view of the facts and circumstances of the case, the Court directed that appropriate orders should be passed regarding the back wages. In the instant case, the Appellate Authority directed reinstatement of the respondent and held that he was not entitled to get backwages for the period he was out of service. It may be noticed that the respondent was removed from service without any enquiry and he was not even given a show cause notice prior to his dismissal from service. There was fault on the part of the employer in not following principles of natural justice. The relevant facts were considered and the learned Single Judge and also the Division Bench ordered the payment of back wages. We do not think this is a fit case where Fundamental Rule 54 could have been invoked by the authorities. We find no merit in the appeal. The appeal is accordingly dismissed."

In view of above observations, according to our opinion, the appellant is entitled to full backwages for interim period with all consequential service benefits.

##. In the result, present Letters Patent Appeal is allowed. The judgment rendered by the learned Single Judge dated January 10, 1996, rendered in Special Civil Application No.11047 of 1994 and impugned in this Appeal is quashed and set aside and consequently, Special Civil Application No.11047 of 1994, is allowed by setting aside the termination order dated 10th September, 1994. The respondents are directed to reinstate the appellant in service with continuity of service with full backwages for the interim period and with all consequential benefits which are available to the appellant as if the service of the appellant had never been terminated by the respondent.

Accordingly, Appeal stands allowed. Civil Application stands disposed of. There shall be no order of costs.

[Bhawani Singh]
Chief Justice

[H.K.Rathod]
Judge

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